Federal Court  Cour fédérale

Date: 20250206

Docket: IMM-9472-23

Citation: 2025 FC 215

Ottawa, Ontario, February 6, 2025

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

MARIO RAUL RODAS TEJEDA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by the Immigration Division [ID], which found that the decision by a delegate of the Minister of Public Safety and Emergency Preparedness [the Minister] to refer the Applicant to an admissibility hearing pursuant to subsection 44(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], 12 years

after he entered Canada and disclosed the potential basis for inadmissibility, was not an abuse of process arising from the Minister's delay.

[2] As explained in further detail below, this application is allowed, because the ID erred in concluding that its jurisdiction, in considering the Applicant's abuse of process arguments, was limited to consideration of the delay following the decision of the Canada Border Services Agency [CBSA] to prepare a report related to the Applicant pursuant to subsection 44(1) of IRPA.

II. Background

[3] The Applicant is a 48-year-old citizen of Guatemala. He entered Canada on or about September 28, 2009 and initiated a refugee claim.

[4] On December 22, 2010, in the context of his Refugee Protection Division [RPD] hearing, the Applicant submitted a Personal Information Form Amendment [PIF], in which he identified his involvement in Guatemala in drug trafficking and the exchange of US dollars into Guatemalan currency for persons he believed were engaged in illegal activities. The CBSA intervened, asserting that the Applicant was excluded from refugee protection under article 1F(b) of the *Refugee Convention*, for engaging in serious non-political criminal activity in Guatemala. The Applicant's refugee hearing was held in January 2011. On January 21, 2011, the RPD denied his refugee claim on the basis that he was excluded under article 1F(b).

[5] In 2012, the Applicant applied for permanent residence on humanitarian and compassionate grounds and applied for a Pre-Removal Risk Assessment [the Applications]. The

Applications were denied in November 2013. In both decisions, the Applicant's involvement in criminal activities in Guatemala was considered.

[6] The Applicant applied for judicial review of the decisions on the Applications and the Federal Court ordered a stay of removal. By consent, the Applications were returned for redetermination. To date, no decisions have been made on these redeterminations, despite multiple requests by the Applicant.

[7] On November 21, 2019, an officer of CBSA exercised their discretion to prepare a report pursuant to subsection 44(1) of IRPA [the Section 44 Report]. That report concluded that the Applicant was involved in the drug trade in Guatemala, based on disclosures made in the Applicant's PIF, including: deciding to enter into the business of selling illegal drugs in 2007; exchanging large amounts of currency through his father's currency exchange business for a man whom he suspected of drug dealing; and selling cocaine and a drug called Sudolor for that man. On this basis, the Section 44 Report concluded that there were reasonable grounds to believe the Applicant is inadmissible to Canada for organized criminality pursuant to paragraph 37(1)(a) of IRPA and recommended that the Applicant be referred to an admissibility hearing.

[8] A delegate of the Minister, acting pursuant to subsection 44(2) of the IRPA, concluded on February 24, 2020, that the Section 44 Report was well-founded, and on March 9, 2022, the Section 44 Report was referred to the ID for an admissibility hearing [the Minister's Decision]. On April 25, 2022, the Applicant applied for judicial review of the Minister's Decision, arguing that it represents an abuse of process due to the Minister's delay in making the referral in relation to facts that were known to the Minister since the time of the RPD proceedings many years

before. That application, in Court File No. IMM-4058-22, was argued at the same time as the present application for judicial review. My decision regarding the application for judicial review of the Minister's Decision [the Referral JR] (*Rodas Tejeda v Canada (Public Safety and Emergency Preparedness)*, [2025 FC 214]) is being released contemporaneously with the present decision.

[9] The inadmissibility allegations in the Section 44 Report are currently before the ID. The Applicant applied to the ID to stay the admissibility proceedings, again advancing abuse of process allegations similar to those in Court File No. IMM-4058-22, due to delay in the section 44 referral to the ID. The ID dismissed that application on July 7, 2023 [the ID Decision]. The Applicant now seeks judicial review of the ID Decision.

III. Decision under Review

[10] The ID addressed the following questions: (a) whether it had jurisdiction to order a stay of proceedings due to an abuse of process caused by delay; (b) how the delay should be calculated; and (c) whether the delay in this case amounted to an abuse of process.

[11] In summary, the ID found that it had a limited jurisdiction to grant a stay of proceedings due to an abuse of process arising from delay, which is calculated from the point when the CBSA decides to prepare a section 44 report. It further found that the delay in this case did not amount to an abuse of process.

[12] The ID concluded that there is nothing in IRPA that withdraws from the ID the authority it holds, by virtue of being an administrative tribunal, to control its own process, but that this process must comply with the rules of procedural fairness (*Prassad v Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560 at 568-69, 1989 CanLII 131 (SCC)).

[13] The ID summarized *Torre v Canada (Citizenship and Immigration)*, 2015 FC 591 [*Torre*], which considered whether the ID had jurisdiction to order a stay of proceedings in the context of alleged abuse of process arising from delay, as well as decisions that followed *Torre* in *Singh v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 455 [*Singh*], *Ismaili v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 427 [*Ismaili*], and *Canada (Public Safety and Emergency Preparedness) v Najafi*, 2019 FC 594 [*Najafi*].

[14] The ID concluded from these authorities that it had the power to grant a stay of proceedings due to an abuse of process arising from delay and that the relevant time period for its consideration of delay began when CBSA made a decision to prepare a subsection 44(1) report on admissibility, noting that the delay must have been part of an administrative or legal process that was already underway. The ID rejected the Applicant's argument that, in considering the applicable delay period, the ID should find that the case is underway when the investigative body receives notice of the issue that prompts the investigation. The ID found that it was bound by the above jurisprudence, which has consistently stated that, in the context of ID proceedings, the delay is calculated beginning at the point when CBSA decides to prepare a section 44 report.

[15] The ID also considered the Applicant's argument that *Torre* is distinguishable because it relied on *Canada (Minister of Citizenship and Immigration) v Katriuk*, 1999 CanLII 9290 (FCTD) [*Katriuk*], a case involving a delay in a proceeding alleging that the applicant had obtained his citizenship by misrepresentation. The Applicant argued that *Katriuk* was distinguishable, because the Court found that the applicant in that case was responsible for the delay. The ID disagreed, noting that *Katriuk* relied on *R v Finta*, 1994 CanLII 129 (SCC) [*Finta*], where the dissent held that pre-charge delay is of itself not counted in determining the relevant delay. The ID found that the Court in *Katriuk* was concerned with more than just the Applicant's own conduct.

[16] The ID noted that, in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 [*Blencoe*], the Supreme Court of Canada [SCC] found that the British Columbia Human Rights Tribunal [the Tribunal] could consider delays that predated the matter being referred to the Tribunal. The ID distinguished that case on the basis of the nature of the Tribunal, reasoning that the delay began in that context when a complaint was filed and the obligations of the British Columbia Human Rights Commission [the Commission] and the Tribunal began. The ID relied on the Court's observation in *Singh* that there is no obligation on immigration officials to act within time periods hoped for by an applicant regarding the making or the referral to the ID of a section 44 report.

[17] The ID also considered the more recent decision of the SCC in *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 [*Abrametz*], describing that decision as determining that the examination of delay began with the commencement of the audit (by the appellant law

society of its respondent member). The ID recognized that the audit commencement was included in what is referred to as the “pre-charge investigation” component of the relevant events. However, it distinguished *Abramatz* based on the nature of the tribunal with which it was concerned and concluded that the period of delay considered by that tribunal began with the audit and not necessarily when information first came to the law society that gave rise to an interest in investigating its member.

[18] The ID concluded that the doctrine of abuse of process is broad and unencumbered by specific requirements. It will therefore vary depending on the context. The ID noted that, in the context of the ID, the case law (referencing *Torre*, *Ismaili*, and *Najafi*) all had the benefit of *Blencoe* and yet did not consider an investigatory period as part of the delay to be examined.

[19] The ID also considered authorities referenced by the Applicant that addressed vacation proceedings before the RPD (*Akram v Canada (Citizenship and Immigration)*, 2019 FC 171; *Mella v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1587; *Lata v Canada (Citizenship and Immigration)*, 2011 FC 459), but it distinguished those authorities because they did not consider the ID’s particular statutory scheme or its limited jurisdiction. The ID similarly rejected the Applicant’s reliance on authorities decided in the criminal law context.

[20] The ID therefore concluded that the delay it should examine, in considering the Applicant’s abuse of process arguments, began when CBSA decided to prepare a subsection 44(1) report on admissibility. In the case at hand, that was a 28-month delay.

[21] The ID then summarized the test for finding that there was an abuse of process, which can be met where a delay affects the fairness of the administrative process or where the delay causes other forms of prejudice. The ID focused first on the fairness of the administrative process. In order to find an abuse of process, the decision-maker must be satisfied that the damage to the public interest in the fairness of the administrative process should the proceedings go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted. The ID noted the explanation in *Blencoe* that, in the administrative law context, there must be proof of significant prejudice resulting from an unacceptable delay.

[22] The ID found that the delay in the case at hand did not compromise the fairness of the hearing. The ID concluded that the Applicant's submissions, that due to the passage of time he is no longer able to recall the details of his activities or history in Guatemala, did not establish how the 28-month delay affected the fairness of the hearing or his memory. The ID found that the Applicant' difficulties in recalling memories due to PTSD were not due to the 28-month delay, nor had the delay exacerbated those difficulties. It held that there was little evidence in the Applicant's medical records that post-dated November 2019 (the timing of the Section 44 Report) and that the evidence did not clearly establish that the 28-month delay affected his mental health and memory. Nor did the Applicant's affidavit establish such an effect.

[23] The ID further noted that the Applicant's lack of documents and inability to contact witnesses were not due to the 28-month delay. The ID observed that the Applicant is no longer in contact with the people he knew when he was living in Guatemala, but it found that there was no evidence as to information that these people could provide or how the 28-month delay affected

this. The ID recognized the Applicant's statement that the bank he was dealing with in Guatemala had closed, but it held there was no information about how the bank records would be of use to him, nor as to efforts made to try and secure those documents. The Applicant also asserted that he would face risk if he contacted police or state agencies, but the ID concluded that such risk was independent of the asserted delay.

[24] The ID then considered other forms of prejudice that the Applicant asserted (related in particular to his mental health but also the effect of the delay on his and his family's overall health, financial, and immigration status), but it concluded that, although the 28-month delay involved in this matter was inordinate, it had not caused the Applicant significant prejudice.

[25] In assessing whether the delay was inordinate, the ID considered: (a) the nature and purpose of the proceedings; (b) the length and causes of the delay; and (c) the complexity of the facts and issues in the case. The ID concluded that the delay was inordinate, not identifying any reason why the complexity of the facts or issues would affect the time required for the Minister to refer the report to the ID.

[26] However, the ID found that the delay did not cause the Applicant significant prejudice, as most of the prejudice he described was the result of events that transpired before November 2019. Therefore, even though this prejudice may have been exacerbated by the delay, he had not established that the 28-month delay had caused him significant prejudice.

[27] The ID therefore dismissed the Applicant's application for a stay of proceedings.

IV. Issues

[28] Together, the parties' submissions raise the following issues for the Court's determination:

A. Is this application for judicial review premature, because the Applicant is challenging an interlocutory decision in the administrative process before the ID?

B. If this application is not premature, what is the applicable standard for review of the ID Decision?

C. If this application is not premature, did the ID err in concluding that the delay in the Minister's section 44 referral does not represent an abuse of process?

[29] The Respondent also raises a preliminary issue, whether a portion of one of the affidavits on which the Applicant relies should be struck, because it post-dates the ID Decision and therefore was not before the administrative decision-maker.

V. Analysis

A. *Preliminary issue*

[30] The Applicant's record includes an affidavit affirmed on September 22, 2023, by Janet Woo, a legal assistant in the employ of the Applicant's counsel, which attached exhibits including a September 11, 2023 letter from a psychologist, Dr. Lisa Ferrari, related to the Applicant's mental health struggles [the Ferrari Letter]. As is evident from the date of the Ferrari Letter, it was not before the ID when it made the July 7, 2023 decision under review.

[31] As the Respondent submits, in an application for judicial review, the general rule is that, with limited exceptions, the Court can only consider the evidentiary record that was before the administrative decision-maker (*Bernard v Canada (Revenue Agency)*, 2015 FCA 263 [*Bernard*] at paras 13-18). One of those exceptions concerns evidence relevant to an issue of procedural fairness (*Bernard* at para 25). As will be explained later in these Reasons, the abuse of process issue that the Court is being asked to address in this matter is a question of procedural fairness.

[32] However, as will also be explained, this is not a situation where the Court is reviewing the fairness of an aspect of the process adopted by the administrative decision-maker whose decision is under review. Rather, the decision-maker has itself made a decision on the fairness of the process to which the Applicant has been subjected, and the Court is being asked to review that decision. I agree with the Respondent that, in such circumstances, the procedural fairness exception does not apply, such that the record before the Court should be limited to the evidence that was before the ID.

[33] This conclusion is consistent with the explanation in *Bernard*, which describes the procedural fairness exception as applying where admission of new evidence would not interfere with the role of the administrative decision-maker as the decider of the merits (at para 25). To review the ID Decision based in part on evidence that was not before it would not respect the role of ID to which Parliament has entrusted authority to make the decision under review (*Bernard* at para 17). Nor would it be analytically coherent to examine whether the ID has erred in making a decision on the merits (even where those merits involve a procedural matter) based on evidence that was not presented to it.

[34] As such, I agree with the Respondent that the Court should disregard the Ferrari Letter, in conducting any review of the ID Decision.

[35] However, this is not the end of the analysis, as the Ferrari Letter is also relevant to the issue to be considered immediately below, whether this application for judicial review is premature. The evidence related to the Applicant's mental health is relevant to assessing whether the Court should depart from the prematurity principle and decide this application on its merits, notwithstanding that the ID Decision is interlocutory and the admissibility proceeding before the ID has not yet run its course to a conclusion. Reliance on the evidence for that purpose does not offend the principle that the Court should review administrative decision-making based on the record that was before the decision-maker.

[36] As such, I will not strike the impugned evidence from the record before the Court, so that it can be taken into account for the limited purpose described above.

B. *Is this application for judicial review premature, because the Applicant is challenging an interlocutory decision in the administrative process before the ID?*

[37] While the ID Decision is a decision on the merits of the procedural issue that the Applicant raised before it, it is also an interlocutory decision. Subject to the result of this application for judicial review, the ID would next move to the process leading to its final decision on the merits of the Minister's inadmissibility allegation against the Applicant.

[38] In this context, the Respondent invokes the prematurity principle. In the context of an interlocutory administrative decision, this principle typically precludes recourse to judicial review when the administrative decision-making process has not yet run its course to the end of the proceeding and the generation of a final decision. The Respondent argues that the ID's admissibility hearing should be allowed to take place, without any current intervention from the Court. The Respondent submits that it is possible that the ID may rule in favour of the Applicant, making the present application for judicial review unnecessary. The Respondent also argues that, in the event the ID rules against the Applicant, the Applicant can then seek judicial review of the ID's final admissibility decision including then raising his procedural fairness argument surrounding abuse of process.

[39] In *Oberlander v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 119 [*Oberlander*] at paragraphs 22 to 27, this Court had an opportunity to canvass the prematurity principle as follows (referencing an earlier related decision in *Oberlander v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 86):

> 22. *Oberlander* addressed the prematurity principle and the Applicant's arguments as to why his application should not be struck based on that principle. While I need not duplicate the analysis in *Oberlander* in the same level of detail in this decision, I will repeat some portions of that analysis that bear on the issue now before the Court.
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> 23. This principle of administrative law was explained as follows by Justice David Stratas in *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 [*CB Powell*] at para 31:
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> > 31. Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule

> against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

24. The prematurity principle was subsequently endorsed by the Supreme Court of Canada in *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paras 35-36.

25. However, there are decisions of this Court post-dating *CB Powell*, in which applications for judicial review of interlocutory administrative decisions, including applications based on arguments of abuse of process in the immigration context, have been allowed to proceed on the merits notwithstanding the prematurity principle. For instance, in *Almrei v Canada (Citizenship and Immigration)*, 2014 FC 1002, Justice Richard Mosley dismissed a motion to strike such an application, as he was not satisfied that the applicant had an adequate alternative remedy available to him. The Court concluded that there were exceptional circumstances pointing to an abuse of process that met the "clear and obvious" standard required to warrant early judicial intervention (at para 60).

26. Similarly, in *Shen v Canada (Citizenship and Immigration)*, 2016 FC 70, Justice Simon Fothergill addressed on its merits an application for judicial review of a decision by the Refugee Protection Division to dismiss two preliminary motions brought by the Applicant. While the Court considered the prematurity principle, it was not satisfied that, in the circumstances of that case, the possibility of judicial review of the RPD's final decision provided an effective remedy (at para 27).

> 27. Consistent with these cases, as identified in *CB Powell* (at para 31), the prematurity principle is not absolute. It applies in the absence of exceptional circumstances. Justice Stratas described this exception as follows (at para 33):
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> > 33. Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high: see, generally, D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf) (Toronto: Canvasback Publishing, 2007) at 3:2200, 3:2300 and 3:4000 and David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at pages 485-494. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted: see *Harelkin*, *supra*; *Okwuobi*, *supra* at paragraphs 38-55; *University of Toronto v. C.U.E.W, Local 2* (1988), 55 D.L.R. (4th) 128 (Ont. Div. Ct.). As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.

[40] The Applicant responds to the Respondent's prematurity arguments by recourse to the jurisprudential recognition that there are exceptional circumstances in which it is appropriate to seek judicial review of an interlocutory administrative decision. The Federal Court of Appeal has

described those circumstances as comparable to those that can justify the issuance of a writ of prohibition (*Dugré v Canada (Attorney General)*, 2021 FCA 8 at para 36). As explained in *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17 at paragraph 33 (rev'd on other grounds 2016 SCC 29), the values underlying the general rule against premature judicial reviews take on less importance in circumstances where prohibition is available, because the effect of an interlocutory decision on the applicant is so immediate and drastic that the Court's concern about the rule of law is aroused.

[41] The Applicant refers the Court to *Beltran v Canada (Citizenship and Immigration)*, 2011 FC 516 [*Beltran*], in which Justice Sean Harrington considered arguments that it was an abuse of process to allow an admissibility proceeding to proceed where the Minister had been aware of all relevant information for 22 years (at para 1). The applicant sought an order of prohibition (at para 12), and the respondent raised prematurity arguments of the sort advanced by the Respondent in the case at hand (at para 30). The Court rejected those arguments, raising concerns about the uncertain future the applicant would face if the matter proceeded through the administrative process (at para 31), as well as the purpose of the abuse of process doctrine, which disentitles the Crown from advancing a matter in circumstances that would represent unfair or oppressive treatment of the subject of a proceeding (at para 32).

[42] Similarly, in *Shen v Canada (Citizenship and Immigration)*, 2016 FC 70 [*Shen*], the respondent raised the prematurity principle when the applicant sought to challenge an interlocutory decision of the RPD that had rejected the applicant's position that the Crown had failed in its duty of disclosure, representing an abuse of process. Justice Simon Fothergill

concluded that the possibility of judicial review of a final decision by the RPD did not provide an effective remedy. The Court noted the great emotional and financial strain that the applicant had experienced during the RPD proceedings and ultimately concluded that permitting the proceedings to continue, without a proper inquiry into whether an abuse of process had occurred, may harm the integrity of the RPD proceedings and bring the administration of justice into disrepute (at paras 26-28).

[43] In the case at hand, the Ferrari Letter (as well as a significant volume of earlier evidence documenting the Applicant's mental health challenges) provides ample evidence of the effect that the ongoing immigration proceedings are having upon the Applicant's mental health. Similar to the reasoning in *Beltran* and *Shen*, I am satisfied that the circumstances of this case represent a situation in which it is appropriate for the Court to examine at this juncture the ID Decision on whether the admissibility proceedings represent an abuse of process, before subjecting the Applicant to the continuation of those proceedings.

[44] There is also another reason for the Court to perform this analysis at this stage in the proceeding. As explained in my decision in the Referral JR, the Respondent raised the prematurity principle in that matter as well. The Court's resulting assessment in the Referral JR as to whether the Referral JR is premature depends on whether the jurisdiction of the ID to consider abuse of process represents an adequate alternative remedy. That is, if the ID does not have such jurisdiction, then the Applicant may not have an adequate administrative remedy. That assessment turns on the question whether the ID's jurisdiction, unlike that of the Court, is

restricted to examining the time-period following CBSA's decision to prepare the Section 44 Report.

[45] That question, surrounding restrictions upon the ID's jurisdiction, is the principal question that the Court must examine in order to address the substantive issue in the matter at hand, *i.e.*, whether the ID erred in concluding that the delay in the Minister's section 44 referral represents an abuse of process. In other words, the required analyses in the two applications for judicial review are inextricably linked, and it is necessary for the Court to address the substantive issue surrounding the ID Decision in order to conduct the necessary prematurity analysis in the Referral JR. That linkage represents an unusual, but in my view exceptional, circumstance that supports a decision not to apply the prematurity principle in the present application.

C. *What is the applicable standard for review of the ID Decision?*

[46] The selection of the standard of review in this matter is not at all straightforward.

[47] The substantive question the Court is required to address in this application is whether the ID erred in concluding that the delay in the Minister's section 44 referral represents an abuse of process. The question of whether there has been an abuse of process is recognized to be one of procedural fairness (*Pardo v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 1769 at para 17). Typically, questions of procedural fairness are reviewed on a standard akin to that of correctness, although strictly speaking the task of the Court in considering issues of procedural fairness is to assess whether an administrative procedure was fair having regard to all

the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

[48] However, there is considerable divergence in the Federal Court's jurisprudence as to whether the correctness standard applies in circumstances where the Court is reviewing an administrative decision-maker's own analysis and conclusions as to whether a particular procedure was fair.

[49] By way of example, several authorities have adopted the correctness standard (see, e.g., *Ahmad v Canada (Citizenship and Immigration)*, 2024 FC 1666; *Ganeswaran v Canada (Citizenship and Immigration)*, 2022 FC 1797 [*Ganeswaran*] at paras 20-28; *Badran v Canada (Citizenship and Immigration)*, 2022 FC 1292 at para 14; *Chabanov v Canada (Citizenship and Immigration)*, 2017 FC 73 at para 23; and *Ismaili* at para 7). However, many other authorities have applied a reasonableness standard (see, e.g., *Naimi v Canada (Public Safety and Emergency Preparedness)*, 2024 FC 1294 [*Naimi*] at paras 8-12; *Kowalska v Canada (Citizenship and Immigration)*, 2024 FC 1053 at para 26; *Khan v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 210 at para 18; *Ahmad v Canada (Citizenship and Immigration)*, 2021 FC 214 [*Ahmad*] at para 13; *Akram v Canada (Citizenship and Immigration)*, 2021 FC 1024 at paras 17-18; and *B006 v Canada (Citizenship and Immigration)*, 2013 FC 1033 at paras 35-36).

[50] The distinction between the Court's review of the fairness of a process followed by an administrative decision-maker, and its review of an administrative decision-maker's own

decision on the fairness of a process, is illustrated by the following explanation by Justice Elizabeth Walker in *Ahmad* at paragraph 13:

> The RAD's determination of whether there was a breach of procedural fairness before the RPD is one aspect of the merits of its decision and is presumptively subject to review for reasonableness, consistent with *Vavilov*. None of the exceptions identified by the Supreme Court for departing from the presumptive standard of review apply in this case. A number of recent decisions of this Court have confirmed reasonableness as the standard of review of the RAD's consideration of the fairness of the RPD's process (*Chaudhry v Canada (Citizenship and Immigration)*, 2019 FC 520 at para 24; *Ibrahim v Canada (Citizenship and Immigration)*, 2020 FC 1148 at para 11). In contrast, if an applicant questions the fairness of the RAD's process, no standard of review is engaged and the Court reviews the RAD's process to determine whether it was fair to the applicant having regard to all the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

[51] In her recent decision in *Naimi*, in which the Court reviewed an RPD decision rejecting an applicant's abuse of process arguments, Justice Anne Turley noted the divergence in the jurisprudence as to the appropriate standard of review but adopted the reasonableness standard (at paras 8-12):

> 8. I note that there is a divergence in this Court's jurisprudence with respect to the appropriate standard of review for the question of abuse of process for delay in bringing a vacation application. This Court has reviewed it against the reasonableness standard, framing the issue as whether the RPD reasonably interpreted or applied the test for delay*: Khan v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 210 at para 18; *Akram v Canada (Citizenship and Immigration)*, 2021 FC 1024 at para 17. This Court has also reviewed it against the correctness standard, framing the issue as whether the RPD brought the administration of justice into disrepute by proceeding with the delayed vacation application: *Hassan v Canada (Citizenship and Immigration)*, 2023 FC 1422 at paras 20, 23; *Ganeswaran* at para 25.

> 9. In this case, the one overarching issue for determination is whether the RPD erred in finding that the doctrine of abuse of process only applies to the delay in the proceedings before the RPD.
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> 10. In my view, the applicable standard of review in this case is reasonableness. As the Supreme Court of Canada made clear, this is the presumptive standard of review: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 25, 31, 49 [*Vavilov*]; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 7, 38-39 [*Mason*]. The presumption of reasonableness review is rebutted where the legislature has indicated that it intends a different standard apply, or where the rule of law requires that correctness review apply: *Vavilov* at para 33; *Mason* at paras 7, 39.
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> 11. This said, the rule of law requires correctness review for "general questions of law of central importance to the legal system as a whole": *Vavilov* at para 53, 58-62; *Mason* at para 47. I am unable to conclude that the RPD's interpretation of the doctrine of abuse of process as it relates to vacation proceedings under the IPRA is a question of central importance reviewable on the correctness standard.
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> 12. For these reasons, I find that reasonableness is the applicable standard of review. A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": *Vavilov* at para 85; *Mason* at para 8. One of the legal constraints bearing on decision-makers is binding jurisprudence: "Any precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide": *Vavilov* at para 112.

[52] In contrast, in *Ganeswaran* (which *Naimi* later followed, other than in relation to the standard of review), Justice Lobat Sadrehashemi also reviewed an RPD decision rejecting an applicant's abuse of process arguments but applied the correctness standard to that review. Because of its contrast with the analyses in the authorities identified immediately above, and

because it relies significantly on the standard of review analysis by the SCC in *Abrametz*¸ it is useful to reproduce Justice Sadrehashemi's standard of review analysis in full:

> 21. In *Abrametz*, the Supreme Court of Canada reaffirmed that an abuse of process due to administrative delay is a question of procedural fairness, noting that "decision makers have, as a corollary to their duty to act fairly, the power to assess allegedly abusive delay" (*Abrametz* at para 38, citing *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras 105-7, 121 [*Blencoe*]; Guy Régimbald, *Canadian Administrative Law*, 3rd ed (Toronto: LexisNexis, 2021) at 344-350; Patrice Garant, Philippe Garant & Jérôme Garant, *Droit administratif*, 7th ed (Cowansville, QC: Yvon-Blais, 2017) at 766-767).
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> 22. *Abrametz* concerned abuse of process due to delay in an administrative proceeding where there was a statutory appeal mechanism. In that context, the Supreme Court of Canada held that appellate standards of review apply (*Abrametz* at para 27). The Court affirmed that, in making this finding, it did not depart from its previous holdings in the context of judicial review and prerogative writs in *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*] and *Mission Institution v Khela*, 2014 SCC 24 [*Khela*] (*Abrametz* at para 28). Accordingly, I see no basis to depart from the usual standard applicable to questions of procedural fairness on judicial review: correctness or a review that is "'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific*]). The question I need to ask is whether the procedure was fair in all the circumstances (*Khosa* at para 43; *Canadian Pacific* at para 54; *Canadian Association of Refugee Lawyers v Canada (Immigration, Citizenship and Refugees)*, 2020 FCA 196 at para 35).
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> 23. I acknowledge that there has been some divergence in our Court as to what standard of review applies to this issue, with some adopting the correctness/fairness standard (see *Naredo v Canada (Citizenship and Immigration)*, 2022 FC 1543 at para 58; *Badran v Canada (Citizenship and Immigration)*, 2022 FC 1292 at para 14 [*Badran*]; *Chabanov v Canada (Minister of Citizenship and Immigration)*, 2017 FC 73 at para 23; *Ismaili v Canada (Minister of Citizenship and Immigration)*, 2017 FC 427 at para 7; and *Pavicevic v Canada (Attorney General)*, 2013 FC 997 at para 29) and others applying a reasonableness standard (see *Cerna v Canada (Minister of Citizenship and Immigration)*, 2021 FC 973 at

para 27 [*Cerna*]; *B006 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1033 at paras 35-36 [*B006*]; and *Akram v Canada (Minister of Citizenship and Immigration)*, 2021 FC 1024 at paras 17-18 [*Akram*]).

24. In *Cerna*, this Court applied a reasonableness standard in the context of an abuse of process determination in a cessation proceeding at the RPD, but Justice Ahmed acknowledged that abuse of process as a breach of procedural fairness had not been argued or considered. Prior to *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 69 [*Vavilov*], Justice Kane in *B006* noted that the parties agreed that the correctness standard applied to the articulation of the test for abuse of process and that the application of the test to the facts is a question of mixed fact and law, where reasonableness review applied. In *Akram*, like in *Cerna*, Justice Strickland found that whether an abuse of process had occurred could not be characterized as a general question of law of central importance to the legal system as a whole requiring correctness review. Justice Strickland also found, like Justice Kane in *B006*, that the determination as to whether an abuse of process had occurred was a question of mixed fact and law, and while it "is an aspect of procedural fairness," the task on review was to consider the merits of the RPD vacation decision and therefore the presumption of reasonableness in *Vavilov* applied.

25. I do not view an abuse of process determination as one relating to the merits of the vacation decision. Rather, I understand it to be strictly a procedural question of whether the RPD would bring the administration of justice into disrepute by proceeding with the vacation application where there has been delay in bringing the application. The question of whether the Minister met the standard required under section 109 of IRPA to vacate the Applicants' Convention refugee status is a question on the merits, and there is no dispute that it would be subject to a reasonableness standard on judicial review (*Vavilov* at para 23). That the Court is reviewing the merits of the decision on the basis of its reasonableness does not stop it from also considering whether another aspect of the decision was unfair. As noted by Justice Rennie in *Canadian Pacific*, the Supreme Court of Canada in *Khela* found that:

> the ability to challenge a decision on the basis that it is unreasonable does not necessarily change the standard of review that applies to other flaws in the decision or in the decision-making process. For instance, the standard for determining whether the decision maker complied with the duty of

> procedural fairness will continue to be "correctness."
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> 26. I further note that the Supreme Court of Canada in *Abrametz* found that "whether there has been an abuse of process is a question of law." I do not view this characterization as a reference only to the articulation of the test for determining an abuse of process, but rather about whether an abuse of process had occurred.
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> 27. In coming to its determination as to whether it would be an abuse of process to proceed with hearing the vacation application, the RPD made findings of fact with respect to delay and prejudice. That there may be deference shown to these findings of fact does not change the standard of review to be applied. As Justice McHaffie recently explained in *Iwekaeze v Canada (Minister of Citizenship and Immigration)*, 2022 FC 814 at paragraph 12:
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> > Within the procedural fairness approach, deference may be given to a tribunal in its procedural choices: *Canadian Pacific* at paras 41–46. This is also true for any findings of fact that are relevant to the procedural issues. However, this does not change the standard of review as a general matter: *Canadian Pacific* at paras 41–46.
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> 28. Ultimately, in reviewing the abuse of process determination, I understand that I am charged with determining whether it was fair for the RPD to proceed with hearing the vacation application given the Minister's delay. As Justice Dickson explained in *Martineau v Matsqui Institution*, 1979 CanLII 184 (SCC), [1980] 1 SCR 602, cited in *Blencoe* at paragraph 105: "In the final analysis, the simple question to be answered is this: Did the tribunal on the facts of the particular case act fairly toward the person claiming to be aggrieved?"

[53] The standard of review analysis performed by the majority in *Abrametz*, upon which *Ganeswaran* relies, reads as follows:

> 26. This case allows the Court to clarify the standard of review applicable to questions of procedural fairness and abuse of process in a statutory appeal. The Court received submissions from the parties and interveners on this point.

> 27. In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, the Court held that when the legislature provides for a statutory appeal mechanism from an administrative decision maker to a court, this indicates that appellate standards are to apply: paras. 33 and 36-52. While this proposition was stated in the context of substantive review, the direction that appeals are to be decided according to the appellate standards of review was categorical. Thus, where questions of procedural fairness are dealt with through a statutory appeal mechanism, they are subject to appellate standards of review.
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> 28. This does not depart from *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, and *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, as those decisions related to judicial review and to the granting of prerogative writs. Here, we are dealing with a statutory appeal. As our Court has stated in *Vavilov*, at para. 36, "[w]here a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis."
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> 29. This case is a statutory appeal pursuant to *The Legal Profession Act, 1990*. Therefore, the standard of review is correctness for questions of law and palpable and overriding error for questions of fact and of mixed fact and law: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43, at paras. 24-25.
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> 30. Whether there has been an abuse of process is a question of law. Thus, the applicable standard of review is correctness.

[54] As *Ganeswaran* recognized, *Abrametz* addressed the relevant standard of review in the context of a statutory appeal mechanism and, relying on *Vavilov*, held that appellate standards of review applied. To that extent, *Abrametz* is in my view not particularly instructive as to the standard of review that applies in the absence of a statutory appeal mechanism. However, *Ganeswaran* also points to the SCC's comment that its conclusion, that the appellate standards of review applied, did not detract from the decisions in *Canada (Citizenship and Immigration) v*

Khosa, 2009 SCC 12 [*Khosa*], and *Mission Institution v Khela*, 2014 SCC 24 [*Khela*]. This comment clearly relates to those authorities' reference to the standard of review applying to matters of procedural fairness in the context of judicial review.

[55] However, in my view, it is less clear whether that comment in relation to *Khosa* and *Khela* is intended to indicate that the majority in *Abrametz* would have selected correctness as the standard of review applicable to the facts of *Abrametz*, even in the absence of a statutory appeal mechanism. Certainly, the majority provides no express statement that correctness applies to a court's review of an administrative decision-maker's own procedural fairness analysis. It may be that the referenced comment was simply intended to confirm that the standard of review analysis and conclusion in *Abrametz* has no jurisprudential impact upon *Khosa* and *Khela*, as those authorities were decided in the context of applications for judicial review rather than statutory appeals.

[56] The analysis conducted by Justice Coté in *Abrametz*, albeit in dissent, is also potentially instructive. Justice Coté explains this aspect of her disagreement with the majority as follows (at para 129):

> Without referring to any precedents on procedural fairness review, my colleague relies on *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, for the proposition that appellate standards of review apply in the present case. Yet our Court's jurisprudence is clear: the question of whether an administrative decision maker has complied with its duty of fairness is subject to the standard of correctness — regardless of the existence of an appeal mechanism. I see no reason to revisit this well-established starting point.

[57] Justice Coté expresses the conclusion that, regardless of whether or not there is a statutory appeal mechanism, the standard of correctness applies to issues of procedural fairness in administrative decision-making. Moreover, as Justice Coté expresses that view in the context of the facts of *Abrametz* (which involved the hearing committee of the appellant law society making a decision on abuse of process arguments), I interpret that the dissent would apply the correctness standard to review of an administrative decision on abuse of process.

[58] In summary on *Abrametz*, I read the dissent as supporting application of the correctness standard to facts such as those presented in the case at hand, but it is less clear to me whether the majority decision can be read in the same manner. However, the parties' submissions in the case at hand provided little analysis to assist the Court in parsing the reasoning in *Abrametz.* Nor did the submissions in the present case meaningfully engage with how application of the standard of correctness might be reconciled with reasoning such as that employed in *Naimi*, to the effect that, unless an abuse of process determination represents a general question of law of central importance to the legal system as a whole, the *Vavilov* presumption of reasonableness review is not displaced.

[59] Furthermore, as will be explained in further detail below, my conclusion is that the ID erred in this matter, regardless of which standard of review is applied. As such, while my Reasons have attempted to dimension the divergence in the jurisprudence in the hope that this will be of future assistance, I decline to attempt to resolve that divergence in the case at hand.

D. *Did the ID err in concluding that the delay in the Minister's section 44 referral does not represent an abuse of process?*

[60] Further to the above standard of review analysis, I will first conduct my review of the ID decision employing the correctness standard and will then explain how application of the reasonableness standard generates the same result. I note that, in applying both standards, I consider the Court's review to be necessarily informed by an examination of the ID's reasons.

[61] As will be apparent from the explanation of the ID Decision earlier in these Reasons, the ID's conclusion, that the 28-month delay identified by the ID did not amount to an abuse of process, turned significantly on its conclusion that its jurisdiction to grant a stay of proceedings was restricted to consideration of delay following the point at which the Minister made a decision to prepare a section 44 report.

[62] In challenging this conclusion, the Applicant relies significantly on *Abrametz*. Clearly that case involved an administrative regime (the disciplinary processes of the Law Society of Saskatchewan) very different from that with which the Court is concerned in the case at hand. However, the Applicant emphasizes the general principles to be derived from *Abrametz*.

[63] The SCC described the doctrine of abuse of process as rooted in a court's inherent and residual discretion to prevent abuse of its processes, a broad concept that applies in various contexts, and characterized by its flexibility without encumbrance by specific requirements (at paras 33-35). The SCC further explained that such flexibility is important in the administrative

law context, given the wide variety of circumstances in which delegated authority is exercised (at para 35).

[64] The ID Decision referenced the explanation of these principles in *Abrametz*. Consistent with the SCC's application of those principles to the Law Society's consideration of abuse of process arguments in that matter, the ID recognized that the doctrine of abuse of process conferred upon not only the courts, but also upon administrative tribunals, the discretion to prevent abuse of their own processes. Although the Respondent argued before the ID that the ID did not have the power to grant a stay of proceedings due to an abuse of process caused by delay, the ID rejected that submission, and the Respondent does not take issue with that conclusion in this judicial review.

[65] However, while the ID relied upon the general principles identified in *Abrametz*, it found *Abrametz* distinguishable, as it did not involve consideration of the ID's particular statutory scheme. It is in that respect that the Applicant argues that the ID erred. The Applicant submits that *Abrametz*, like the SCC's earlier decision in *Blencoe*, assessed abuse of process by considering the entire period of governmental delay, beginning when the government first received notice of the relevant legal issue.

[66] I agree with the Applicant's interpretation of *Abrametz*. Relying on *Blencoe* (at para 122), *Abrametz* explained (at para 57) that, when an applicant submits that an inordinate delay amounts to an abuse of process, courts and tribunals are called on first to ascertain the length and causes of the delay. The SCC further explained that the duty to be fair is relevant at all stages of

administrative proceedings, including the investigative stage, and that, when assessing the actual time period of delay, the starting point should be when the administrative decision-maker's obligations, as well as the interests of the public and the parties in a timely process, are engaged (at para 58). Applying those principles to its facts, *Abrametz* analysed the delay from the Law Society's commencement of its audit in December 2012 to its hearing committee's November 2018 rejection of the applicant's request for a stay (at paras 107-108).

[67] Similarly, in *Blencoe*, the SCC considered the relevant period to begin when a human rights complaint was first filed with the Commission. Complaints were filed in 1995, resulting in an investigation by the Commission in 1996, following which the respondent to the complaint was advised in 1997 that a hearing was scheduled before the Tribunal for 1998. The overall result was that the hearing was scheduled to take place approximately 32 months after the initial complaint was filed (at paras 3-11). As reflected in the ID Decision, although the SCC concluded that some of the later delays were attributable to the respondent, *Blencoe* examined the period of delay commencing with the filing of the first complaint in 1995 (at paras 124, 132).

[68] However, again the ID concluded that *Blencoe* was distinguishable because of the nature of the administrative tribunal involved. The Applicant argues that the ID thereby erred, submitting that there is no principled basis on which to distinguish the administrative regime in *Blencoe* from that applicable in the case at hand, so as to immunize from scrutiny the period between the Minister becoming aware of the issue relevant to the Applicant's admissibility and the decision to prepare a section 44 report.

[69] I note that, in an effort to distinguish *Abrametz*, the ID stated that the period of delay began with the Law Society's audit and not necessarily when information first came to the Law Society that gave rise to an interest in investigating its member. I do not find that reasoning particularly well grounded in the facts and reasoning of *Abrametz*. While I accept that it is possible some period of time may have passed between those two events, *Abrametz* does not draw such a distinction or provide any analysis suggesting that such a period is immune to consideration in assessing arguments of abuse of process due to delay. To the contrary, the Court's reference to the starting point for consideration of delay, being when the administrative decision-maker's obligations and the interests of the public and the parties in a timely process are engaged, is inconsistent with such a conclusion.

[70] Consistent with the Applicant's position, I read the ID's conclusion, that the SCC authorities are distinguishable, to be based mainly on perceived differences between the administrative regimes or tribunals involved. However, while obviously those authorities and the case at hand involve different regimes, I agree with the Applicant that the ID Decision does not identify a principled basis to distinguish them, such that the SCC authorities would not support a conclusion that the ID has jurisdiction to examine delay commencing with the time that the Minister first became aware of the potential admissibility issue. Other than its reliance on certain Federal Court authorities, to which I will turn shortly, the ID Decision discloses no explanation for the conclusion that the different administrative regimes warrant different applications of the principles identified in the SCC jurisprudence.

[71] Before turning to the Federal Court authorities referenced immediately above, it is instructive to consider the Court's application of *Abrametz* to the vacation of refugee protection regime administered by the RPD. *Ganeswaran* involved a family, consisting of a mother and her three sons, who successfully claimed refugee protection in 2008. Approximately a month later, immigration officials discovered that the family had not arrived in Canada from Sri Lanka as claimed, but rather had lived for many years in Switzerland where the minor claimants were born. An immigration officer then indicated the intention to pursue vacation of the positive refugee determination by the RPD. However, approximately 10 years passed before the responsible minister commenced proceedings to vacate (at paras 1-2).

[72] Prior to the RPD vacation hearing, the family's counsel indicated an intention to argue that the minister's delay in bringing the application to vacate was an abuse of process that should result in a stay of proceedings. The RPD rejected this position, finding that, although the 10-year delay had been inordinate, the delay had not resulted in prejudice that warranted a finding of abuse of process. The family sought judicial review of the RPD's abuse of process decision. Although the RPD had considered the entire period of delay, commencing with the immigration officer's indication of an intention to pursue vacation proceedings, the respondent argued in the judicial review that the RPD was not empowered to consider delay other than its own delay in holding a hearing and rendering a decision.

[73] In rejecting the respondent's argument, Justice Sadrehashemi (*Ganeswaran* at paras 39-43) relied on the recently released decision in *Abrametz*. The Court noted the SCC's explanation that, when assessing the actual time period of delay, the starting point should be when the

administrative decision-maker's obligations, as well as the interests of the public and the parties in a timely process are engaged, and that the duty to be fair is relevant to all stages of administrative proceedings including the investigative stage (*Abrametz* at para 58).

[74] Justice Sadrehashemi observed that the RPD does not perform an investigative function. Rather, it is the relevant minister who is charged with bringing a vacation application to the RPD, including responsibility for investigating a misrepresentation in a refugee claim and deciding whether to bring an application to vacate to the RPD. The Court held that the minister's conduct in investigating a possible misrepresentation is not immune from scrutiny and is subject, like all administrative actors, to the duty of fairness (*Ganeswaran* at para 42).

[75] The respondent raised similar arguments in the recent decision in *Naimi*, again in the context of an RPD decision in an abuse of process application based on delay. The RPD concluded that, for delay to constitute an abuse of process, it must relate to the proceeding before the RPD. The RPD therefore held that any delay by the minister in investigating an alleged misrepresentation, before initiating a vacation proceeding, was not relevant to the evaluation of an abuse of process (at para 13).

[76] I will return to *Naimi* later in these Reasons, including when applying the reasonableness standard of review to the ID Decision. For present purposes, it is sufficient to note that *Naimi* followed the reasoning in *Ganeswaran*, based on *Abrametz*, in concluding that the RPD had erred in refusing to consider the minister's delay in the investigation leading to the commencement of the vacation proceeding. In so concluding, *Naimi* rejected the RPD's reliance

on the line of jurisprudence commencing with *Torre*, in the context of admissibility proceedings before the ID, because they pre-dated *Abrametz* and *Ganeswaran* (*Naimi* at paras 15-24).

[77] It is therefore necessary to turn to that line of jurisprudence, to assess whether it supports a conclusion that the ID was correct in the case at hand in relying on that jurisprudence to distinguish *Abrametz*. *Torre* involved a permanent resident who in 2014 was facing admissibility proceedings before the ID, based on a criminal conviction in 1996 and a referral to the ID in 2013. The applicant had brought a motion to stay the ID proceedings for abuse of process resulting from the 17-year delay. However, the ID concluded that it did not have jurisdiction to hear that motion (at para 9).

[78] In its review of that decision, the Court found that it was unlikely the ID had the jurisdiction to grant a permanent stay of proceedings (at paras 20-21). Rather, Justice Danièle Tremblay-Lamer concluded that the ID has limited authority, and no discretion, at the stage when a report is referred to it under subsection 44(2) of IRPA. It must hold an admissibility hearing quickly, and if it finds the person inadmissible, it must make a removal order (at para 22). Therefore, the ID had not erred when it refused to hear the stay motion because it lacked jurisdiction to do so (at para 25).

[79] Having concluded that the ID lacked jurisdiction to do so, the Court then proceeded (at para 26) to commence its own analysis of whether the delay amounted to an abuse of process. Referencing *Blencoe* and *Katriuk* (an analysis to which I will return shortly), the Court concluded that for the delay to qualify as an abuse of process, it must have been part of an

administrative or legal proceeding that was already under way, and that the only delay to be considered was the delay between the decision made by CBSA to prepare a report under section 44 of the IRPA and the ID's admissibility finding (at paras 30-32).

[80] In *Ismaili*, Justice Alan Diner considered *Torre* in the case of a former Canadian citizen, who had become a permanent resident in 1983 and a citizen in 1987 but had failed to inform Canadian officials of a 1980 armed robbery conviction in the United States. In 1999, after the relevant minister became aware of that past conviction, the applicant was alerted to the minister's intent to revoke his citizenship, which revocation ultimately occurred in 2013. As the applicant was then a foreign national, a section 44 report was issued against him and referred to the ID, resulting in the 2016 admissibility proceeding that was the subject of the judicial review (at paras 1-4).

[81] Before the ID, the applicant argued that the 17-year delay between the first citizenship revocation notice in 1999 and the admissibility proceedings before the ID in 2016 amounted to an abuse of process warranting a stay of proceedings. Relying on paragraph 32 of *Torre*, the ID held that it could only consider the delay from the time the decision was made to prepare the section 44 report, a 2-year period. The ID then applied the abuse of process test explained in *Blencoe* and found that the delay did not amount to an abuse of process. On judicial review, the applicant argued that the ID should have considered the entire 17-year period of delay (at paras 5-6).

[82] *Ismaili* relied on the conclusion in *Torre* that the ID had not erred in declining to hear an application for a stay of proceedings on jurisdictional grounds, analyzing applicable jurisprudence and finding no reason to depart from that view (*Ismaili* at paras 8-24). Justice Diner did, however, refer to the ID having a very limited discretion to consider abuse of process arguments for purposes of granting a stay of proceedings (at para 24). *Ismaili* then considered the correctness of the ID's finding that there had been no abuse of process and, again relying on *Torre*, concluded that, when the Court must examine whether an abuse of process due to delay merits a stay of an admissibility proceeding before the ID, the clock starts ticking for purposes of calculating the delay when the decision is made to prepare a section 44 report (at paras 29-30).

[83] In *Najafi*, Associate Chief Justice Jocelyne Gagné addressed a minister's application for judicial review of a decision of the Immigration Appeal Division, which had in turn considered an appeal from an ID decision that had stayed an admissibility proceedings due to a conclusion that unreasonable delay in referring the section 44 admissibility report to the ID amounted to an abuse of process. The Court was therefore required to address question of whether the ID had the jurisdiction to permanently stay an admissibility hearing before it for abuse of process (at paras 1-2).

[84] In its decision, the ID referred to authorities identifying the power of administrative tribunals to uphold the principles of natural justice and noted that, while *Torre* had concluded that the ID did not have such jurisdiction to issue a stay, the ID had in the past done so (*Najafi* at paras 14-17). The IAD agreed with the ID, notwithstanding the doubts expressed in *Torre*.

[85] In conducting its review, the Court took into account the broad powers that IRPA granted to the ID to deal with proceedings brought before it, as well as the general power of administrative tribunals to consider the principles of natural justice and procedural fairness (*Blencoe* at para 102). Associate Chief Justice Gagnè considered the conclusions in *Torre* and *Ismaili* that the ID had limited, if any, jurisdiction to stay admissibility proceedings, but referred to paragraph 32 of *Torre* as leaving the door open to consider a delay occurring between the decision to prepare a section 44 report and the ID's admissibility finding. As the ID's decision in *Najafi* involved a significant 13-year delay between the preparation of the report and its referral to the ID, the Court found that the conclusion that the ID had jurisdiction to grant a stay in that case was not inconsistent with *Torre* and *Ismaili* (at paras 33-40).

[86] While there are other cases in this line of jurisprudence, those canvassed above sufficiently explain the genesis of this line to assist the Court in reconciling it with the principles in *Blencoe* and *Abrametz* and the application of those principles in *Ganeswaran* and *Naimi*. Principally, *Torre* and the cases that followed it were concerned with the question whether the ID had jurisdiction to entertain an application for a stay of proceedings due to a delay amounting to an abuse of process. The Court in *Torre* thought not but, by the time *Najafi* was decided, that thinking had evolved into a conclusion that such jurisdiction did exist (a conclusion that the Respondent does not contest in the case at hand). *Najafi* applied that conclusion in the context of facts that involved a significant delay in the period that *Torre* had examined, commencing with the decision to prepare the section 44 report.

[87] However, the conclusion in *Torre*, that only that period was relevant, did not relate to the ID's jurisdiction to consider abuse of process attributable to delay (which *Torre* found did not exist) but rather to the Court's jurisdiction to consider abuse of process in those circumstances. This is clear from Justice Tremblay-Lamer's explanation at the beginning of that portion of the decision that, even though she had concluded that the ID did not have the required jurisdiction to hear the motion for a stay of proceedings, the delay remained, and the Court was therefore required to determine whether there was an abuse of process (at para 26).

[88] The Applicant argues that *Torre*'s conclusion (that the only relevant delay period for the Court to consider in its own abuse of process analysis was that which commenced with the decision to prepare the section 44 report) was based on a perfunctory analysis and a misreading of *Katriuk* and its reliance on *Finta*, which related to the significance of pre-charge delay for purposes of the right to a speedy trial under section 11(d) of the *Charter*. The Respondent rejects those criticisms. However, it is not necessary for the Court to engage with those arguments, because it appears to be clear at present (and the parties agree) that the Court has the jurisdiction to consider all periods of delay leading to the stage that the ID's processes have reached in the case at hand (see, e.g., *Beltran*).

[89] The law appears to have evolved away from the limitation upon the Court's jurisdiction raised in *Torre*. More importantly, once it is appreciated that *Torre* did not raise such limitation in relation to the jurisdiction of the ID, *Torre* and the authorities that followed it do not support a conclusion that there is something unique about the ID or its statutory regime that limits its

jurisdiction in a manner inconsistent with *Abrametz* or the application of *Abrametz* to the jurisdiction of the RPD.

[90] I therefore find that the ID decision incorrectly held that the ID's jurisdiction was subject to the limitation that *Torre* and its progeny suggested.

[91] As indicated earlier in these Reasons, I also consider the ID to have erred in this conclusion if reviewed under the standard of reasonableness. Reasonableness review requires a respectful attention to the reasons given by the administrative decision-maker by way of justification for its decision, warrants deference to such reasons, and acknowledges the possibility of a range of acceptable outcomes (*Vavilov* at paras 83-86). However, in the above analysis under the correctness standard, I have taken into account the ID's justification for its decision and, for the reasons explained in my correctness review, once the relevant legal and factual constraints are taken into account, the ID's conclusions are not capable of withstanding review even on the more deferential standard.

[92] In this respect, the reasonableness analysis is similar to that applied by Justice Turley in *Naimi.* As previously noted, *Naimi* followed the reasoning in *Ganeswaran*, based on *Abrametz*, in concluding that the RPD had erred in refusing to consider the minister's delay in the investigation leading to the commencement of the vacation proceeding. *Naimi* rejected the RPD's reliance on the line of jurisprudence commencing with *Torre* (*Naimi* at paras 15-24) and found that the RPD's interpretation of the applicability of the abuse of process doctrine was

unreasonable, as it was not justified in relation to the jurisprudential constraints upon its decision-making authority (at paras 12-14).

[93] Turning to remedies, regardless of which standard of review is applied, my view is that the result of this judicial review should be comparable to that in *Naimi*. Justice Turley concluded that, because of its finding that the minister's delay was irrelevant, the RPD did not proceed to consider whether the delay alleged by the applicant constituted an abuse. The Court noted that it was not its role to step into the shoes of the RPD and make the decision the RPD should have made. Rather, it was incumbent on the RPD, as the tribunal tasked with deciding these matters at first instance, to make a decision, without its unreasonably constrained view of the delay that it was entitled to take into account (at paras 25-27).

[94] *Naimi* also observed that, in performing that task, the RPD would be required to determine the period of delay in question, *i.e.*, when the clock started ticking in that case - for instance, when the respondent obtained information about the applicants' identities or, rather, at some earlier point in time when the respondent first had reason to believe that the applicants may have misrepresented their identities (at para 28).

[95] Similarly, in the case at hand, the appropriate remedy is to quash the ID Decision and remit this matter to the ID to re-determine the Applicant's abuse of process application, without the unreasonably and incorrectly adopted constraint that prevented the ID from considering delay that preceded CBSA's decision to prepare the Section 44 Report. On the facts of the case at hand, it may be that the selection of the starting point for the delay is more straightforward than

in *Naimi* and is simply the point in 2010 when the Applicant submitted his PIF, in which he identified his involvement in drug trafficking and the exchange of US dollars into Guatemalan currency. However, as in *Naimi*, the starting point for the delay should be selected by the administrative decision-maker. Having made that selection, the ID can then apply the test identified in *Abrametz* to its consideration of the Applicant's abuse of process arguments, without the constraint that resulted in the error identified in these Reasons.

VI. Certified Question

[96] The Applicant asks that the Court certify the following question for appeal in this matter,:

> Does the Immigration Division of the Immigration and Refugee Board have the jurisdiction to grant a stay of proceedings upon finding an abuse of process taking into account delays by the Canada Border Services Agency before making a decision to prepare a report pursuant to section 44 of the *Immigration and Refugee Protection Act*, SC 2001, c 27?

[97] In order for the Court to certify a question for appeal under paragraph 74(d) of the IRPA, the question must be dispositive of the appeal, transcend the interests of the parties, and raise an issue of broad significance or general importance. The question must have been dealt with by the Court and arise from the case itself, rather than the way in which the Court may have disposed of the case (*Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36). In my view, the proposed question is one of general importance, in that its answer would guide the ID and litigants in other matters that raise abuse of process arguments surrounding administrative delay. The answer would also be determinative of an appeal in that matter, in that my decision in this matter has turned on that answer.

[98] I am conscious that the Respondent, the unsuccessful party in this application and therefore the only party that could pursue an appeal, opposes certification. However, as my decision in the Referral JR certifies the same question in that application, in which the Applicant was unsuccessful because his application fell afoul of the prematurity principle, the question should be certified in the present application as well. As a result, in the event that an appeal on that question were to be successful, the Court's decisions in both the Referral JR and in the present application can be reviewed on appeal.

[99] My Judgment will therefore certify the proposed question.

JUDGMENT IN IMM-9472-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed, the ID Decision is set aside, and the matter is returned to a differently constituted panel of the ID for re-determination in accordance with the Court's Reasons.

2. The following question is certified for appeal:

> Does the Immigration Division of the Immigration and Refugee Board have the jurisdiction to grant a stay of proceedings upon finding an abuse of process taking into account delays by the Canada Border Services Agency before making a decision to prepare a report pursuant to section 44 of the *Immigration and Refugee Protection Act*, SC 2001, c 27?

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-9472-23
STYLE OF CAUSE:	MARIO RAUL RODAS TEJEDA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	OCTOBER 24, 2024
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	FEBRUARY 6, 2025

APPEARANCES:

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